



WISCONSIN PUBLIC RECORDS LAW

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WILL COVER

- Important definitions
- Adequate request
- Adequate response
- Permissible costs

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FINDING THE LAW

- Wis. Stat. § 19.31 – 19.39
- Cross-referenced statutes
- Interpretive case law
- Attorney General opinions
- DOJ correspondence
- FOIA – persuasive value

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PRESUMPTION

The public records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

— Wis. Stat. § 19.31

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KEY POINTS

- Purpose is to shed light on workings of government and acts of public officers and employees
- Presumption of disclosure is strong but not absolute
- "Except as otherwise provided by law, any requester has a right to inspect any record."
- Exceptional case: public policies favoring disclosure are outweighed by public policies against disclosure

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DEFINITIONS

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KEY DEFINITIONS

- Authority
- Legal Custodian
- Record
- Requester

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AUTHORITY

- Any of specified entities "having custody of a record"
- Very similar to "governmental body"
- Includes "quasi-governmental corporation"
- Public records law obligations apply separately to each authority

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LEGAL CUSTODIAN

- Vested by authority with full legal power to render decisions and carry out public records responsibilities
- Elected official, chairperson of committee of elected officials, or designee
- Other authorities to designate one or more positions
- Defaults are highest ranking officer and chief administrative officer, if any

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RECORD

"Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority."

— Wis. Stat. § 19.32(2)

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KEY POINTS

- Access to records, not answers to questions
- Content and substance control, not format or location
- Does not include everything a public official or employee creates
- Includes contractors' records produced or collected under a contract entered into with the authority
- Authority may choose to do more than the public records law requires

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NOT A RECORD

- Drafts, notes, and preliminary documents
- Published material available for sale or at library
- Purely personal property
- Material with limited access rights, such as copyrights or patents

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ELECTRONIC RECORDS

- Same rules generally apply
- Can be challenging
- Current public records statutes date to 1982
- Pending: *Schill v. Wisconsin Rapids Sch. Dist.*, No. 2008AP967 (Wis. Sup. Ct.) (personal e-mail)

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REQUESTER

- Generally, any person who requests inspection of or to copy a record
- More limited rights for persons committed under mental health laws or incarcerated
- Per Wis. Stat. § 19.35(1)(am), a requester has greater rights to records that contain personally identifiable information about himself or herself

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KNOWLEDGE TEST

- Audiotape used to prepare minutes of a meeting
- E-mail sent from an employee's home computer, with "some thoughts about the new parkland acquisition"
- E-mail sent from an employee's Yahoo account with "some thoughts about why the new customer service strategy will fail"
- Certificate of commendation for outstanding work on a special project

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POLICIES

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REQUIREMENTS

Authorities must adopt, display, and make available for inspection and copying at their offices information about their public records policies

- Costs
- Legal custodian
- Times and places at which public may access records, make requests for records, obtain copies of records

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KEY POINTS

- Specific requirements in Wis. Stat. § 19.34
- Some recent changes, good idea to check and update
- Exception for members of legislature or members of local governmental body
- DOJ Notice, Appendix B

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REQUESTS

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WHO CAN REQUEST?

- Requester need not state the purpose of the request
- Requester generally need not identify himself or herself
- Motive not relevant, but context appropriately considered
- Limitations on requests by prisoners and committed persons

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WRITTEN REQUEST?

- Not required, but may be a good idea
- Adds clarity
- Creates a paper trail
- OK to contact requester for clarification, or for confirmation before significant costs are incurred
- What about asking requesters to fill out a form?

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SUFFICIENT REQUEST

- Magic words not required
- Reasonably describes the information or record requested
- Reasonably specific as to time and subject matter
- Custodian should not have to guess at what records the requester desires

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SUFFICIENT REQUEST, cont.

- Cannot so burden a custodian that normal functioning of office would be impaired
- Certain types of records may have special confidentiality protections, such as health care records or pupil records. If applicable, does the requester show entitlement to those records?
- Advice: Be reasonable!

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KNOWLEDGE TEST

- "Pursuant to FOIA, I request a copy of any records about me maintained by the department."
- "Pursuant to the public records law, please provide copies of the minutes for all closed sessions of the Personnel Committee during April and May 2009, and all handouts distributed in those closed sessions."
- "I request copies of all reports for police responses to 17 West Main Street last year."

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RESPONSES

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TIMING

- Response is required, "as soon as practicable and without delay"
- No specific time limits, depends on circumstances
- DOJ policy: 10 business days generally reasonable for simple response
- May be prudent to send an acknowledgement
- Penalties for arbitrary and capricious delay

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EXISTING RECORDS

- Generally, only records that exist at the time of the request must be produced
- Continuing requests not contemplated by the public records law
- Exceptions: transcribe audiotape, provide computer data in comprehensible form
- Custodian may choose to do more than the public records law requires

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WRITTEN RESPONSES

- A written request requires a written response, if the request is denied in whole or in part
- Must inform requestor that denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1) or by application to district attorney or Attorney General

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USEFUL ANALYSIS

1. Does a responsive record exist?
2. Is there an absolute right of access?
3. Is access absolutely denied?
4. Apply the balancing test

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THE BALANCING TEST

- Weigh the public interest in disclosure of the record against the public interest and public policies against disclosure
- Fact intensive
- Must conduct on case by case basis
- "Blanket rules" disfavored

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SOURCES OF PUBLIC POLICIES

- Open meetings exemptions
- Case law
- Other statutes
- Evidentiary privileges
- Privacy and reputational interests
- Effective government operations
- Logic and common sense

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RECORDS ABOUT CHILDREN

- Juveniles subject to Chapter 938 proceedings
 - Law enforcement & court – Wis. Stat. § 938.396
 - Agency – Wis. Stat. § 938.78
- Children subject to CHIPS, TPR or other Chapter 48 proceedings
 - Law enforcement & court – Wis. Stat. § 48.396
 - Agency – Wis. Stat. § 48.78
- Other children – balancing test

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REASONS FOR DENIAL

- Reasons for denial must be specific enough for the requester to understand
- Reasons for denial must be sufficient under the public records law
- Purpose is to give adequate notice of reason for denial and ensure that custodian has exercised judgment
- Provides basis for court review

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REASONS FOR DENIAL, cont.

- Reviewing court usually limited to reasons stated in denial
- If confidentiality guaranteed by statute, citation to statute is sufficient
- Need to restrict access must still exist at time request is denied
- Availability from other sources generally not sufficient reason for denial
- Advice: Be reasonable!

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REDACTION

- If part of a record is disclosable, that part must be disclosed
- Non-disclosable portions must be redacted
- No mandated way to make redactions: black magic marker, cover up with white paper when photocopying, electronic redaction
- Redaction vs. creating new electronic record

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NOTICE BEFORE RELEASE

- Records information resulting from closed investigation into a disciplinary matter or possible employment-related violation of policy, rule, or statute
- Records obtained by subpoena or search warrant
- Records prepared by an employer other than the authority about employees of that employer
- Expedited process for judicial review of decision to release records; see Wis. Stat. § 19.356

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INSPECTION OR COPIES

- A requester generally may choose to inspect records or to receive copies
- If copies are desired, custodian determines whether requester is allowed to make copies or use scanner
- Generally, right to copy in original format
- Custodian may impose reasonable conditions on access to fragile records

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KNOWLEDGE TEST

- "Your request is denied pursuant to the public records balancing test."
- "Your request is denied because it would take four weeks to photocopy the responsive documents."
- "Under the balancing test, your request is denied to protect the children named in the police report from teasing and harassment at school. I find that the public policy favoring protection of the children from harassment outweighs the presumption of disclosure."

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COSTS

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PERMISSIBLE CHARGES

- Copying and reproduction
- Mailing
- Location, if exceeds \$50.00 (time x rate)
- Computer programming
- Others specified in Wis. Stat. § 19.35(3)
- Redaction costs – evolving issue
- “[A]n authority may recoup all of its actual costs.”

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KEY POINTS

- Actual, necessary, and direct costs only — unless otherwise specified by law
- Prepayment may be required if total costs exceed \$5.00
- Authority may choose to provide records for free or reduced charge
- Advice: Be reasonable!

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KNOWLEDGE TEST

- May an authority charge a requester for the computer programming necessary to produce a requested database report?
- May an authority charge the requester the cost of hiring a temporary employee to complete a large photocopy job necessary to provide requested records?
- If the assistant who usually makes photocopies is on vacation, may the authority charge the requester at a higher supervisor’s hourly rate?

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ENFORCEMENT

- Mandamus procedures set forth in Wis. Stat. chs. 781 and 783
- Availability of attorney fees and costs to prevailing party
- Punitive damages for arbitrary delay or denial

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FURTHER INFORMATION

- Consult legal counsel
- Download DOJ Outline free of charge, at www.doj.state.wi.us
- Call Connie Anderson, (608) 266-3952
- Write to: Attorney General J.B. Van Hollen

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